FILED

99 277 AUG 16 1999

OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

DONALD MICHAEL PLETCHER, Petitioner

V.

COMMONWEALTH OF KENTUCKY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF KENTUCKY

JOSEPH G. GLASS
235 South Fifth Street
Louisville, Kentucky 40202
(502) 584-7288

Counsel for Petitioner

6788

QUESTION PRESENTED

Does Imposition of additional loss of drivers license penalties under a habitual violator statute, in separate proceedings, after similar penalties have been imposed upon a defendant pursuant to a driving under the influence statute constitute double jeopardy in violation of the Constitution of the United States of America, Amendment V and XIV?

LIST OF PARTIES

The parties to the proceedings below are contained in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT 7

REASONS FOR GRANTING THE PETITION 10

Imposition of additional loss of driver license penalties under a habitual violation statute. in separate proceedings after similar penalties have been imposed upon a defendant pursuant to a driving under the influence statute constitutes double jeopardy in violation of the Constitution of the United States of America. Amendment V and XIV. 10

CONCLUSION 19

APPENDIX A 1a
B 11a
C 22a
D 37a
E 46a

TABLE OF AUTHORITIES

Cases:	Page
United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed 2d 549 (1996)	10, 11, 17
Statutes:	
KRS 186.642	3, 7, 8, 9, 10, 16
KRS 186.643	3, 12
KRS 186.644	3, 12
KRS 186.645	4, 12
KRS 186.646	5, 8, 10, 14, 15, 16
KRS 186.647	5, 13
KRS 186.648	5, 12
KRS 186.649	5, 12
KRS 189A.010	6, 7, 8, 16
KRS 189A.070	6, 7, 8, 9, 10, 15
Constitution, Amendment V	2, 8, 9, 10
Constitution, Amendment XIV	2, 10

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DONALD MICHAEL PLETCHER, Petitioner
v.
COMMONWEALTH OF KENTUCKY, Respondent

The petitioner, Donald Michael Pletcher respectfully prays that a Writ of Certiorari issue to review the Opinion of the Court of Appeals of Kentucky rendered on September 25, 1998.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky (App., infra, 1a to 10a) is not yet reported. The Opinions of the Jefferson Circuit Court (App., infra, 11a to 21a) and the Jefferson District Court (App., infra, 22a to 36a and 37a to 45a) are unreported. The Supreme Court of Kentucky denied Discretionary Review on June 9, 1999 (App., infra, 46a).

JURISDICTION

The Court of Appeals of Kentucky rendered its Opinion

on September 25, 1998 (App., infra 1a to 10a). Discretionary Review of that Opinion was denied by the Supreme Court of Kentucky on June 9, 1999 (App., infra, 46a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth and Fourteenth Amendments to the Constitution:

AMENDMENT 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1, to the Constitution:

AMENDMENT 14
Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY REVISED STATUTES INVOLVED

KRS 186.642. "Habitual violator" defined.

An habitual violator shall be construed to mean any person, resident or nonresident, who has been convicted in this state or elsewhere: -

(1) Three (3) or more times of voluntary or involuntary manslaughter occurring on separate dates and resulting from the operation of a motor vehicle; or

(2) Three (3) or more times of violating the provision of KRS Chapter 189A relating to the operation of vehicles while under the influence of a controlled substance or intoxicating liquors, or violating the law of any other state, or a valid municipal or county ordinance, substantially conforming to or paralleling said section; or . . . . .

KRS 186.643. Information to be filed by county attorney.

The county attorney, upon receiving from the secretary of the Transportation Cabinet the abstract of record shall forthwith file an information against accused person in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides.
(Enact. Acts 1974, ch. 374, Section 3.)

KRS 186.644. Hearing.

The court in which such information is filed shall enter an

order directed to the person accused of being "an habitual violator" of the motor vehicle laws to show cause why he should not be barred from operating a motor vehicle in the State of Kentucky. If the court cannot, on the evidence available, make a determination as to the existence of any record of prior conviction, or if the court is not satisfied that the accused is the same person named in the records, or both, the court may certify such question for hearing and determination to the court in which such conviction was had. A court in this state to whom such certification is made shall forthwith conduct a hearing and make a finding of fact and determination of the existence of any record of prior conviction and the identity of the person, and send a certified copy of its order to the court before whom the information alleging the person to be "an habitual violator" is pending. The provisions of this section shall not be binding upon an out-of-state court; however, any court in this state may request any out-of-state court to voluntarily provide the information sought pursuant to this section.
(Enact. Acts 1974, ch. 374, Section 4.)

KRS 186.645. Findings of court.

If the court finds that such accused person is not the same person as the accused named in such records, or that his convictions are not such as to constitute him "an habitual violator" under KRS 186.641 to 186.649 the information shall be dismissed; but if the court finds that the accused is the same person named in the records certified by the secretary, the court shall, except for good cause shown, find such person guilty of being "an habitual violator" of the motor vehicle and traffic laws of Kentucky as set forth herein, and shall, by appropriate order, direct such person not to operate a motor vehicle on the public highways of the State of Kentucky. The clerk of the court shall file with the Transportation Cabinet a copy of the order of the court which shall become a part of the permanent records of the cabinet.
(Enact. Acts 1974, ch. 374, Section 5.)

KRS 186.646. License not to be issued to habitual violator.

No license to operate motor vehicles in Kentucky shall be issued to a convicted habitual violator:

(1) For a period of five (5) years from the date of the order of the court finding such person to be "an habitual violator," wherein the convictions relate to the offenses listed in KRS 186.642(1) and (2), and . . . . .

KRS 186.647. Restoration of license.

At the expiration of two (2) or five (5) years, as the case may be, from the date of any final order of the court entered under the provisions or KRS 186.641 to 186.649, finding a person to be "an habitual violator" and directing him not to operate a motor vehicle in this state, such person may petition the court in which he was convicted of being "an habitual violator" or any court of record in Kentucky having criminal jurisdiction in the political subdivision in which such person then resides to have his privilege to operate a motor vehicle restored. And upon such petition, and for good cause shown, the court may, in its discretion, restore the privilege of such person to operate a motor vehicle upon such terms and conditions as the court may prescribe, subject to other provisions of law relating to the issuance of operator's or chauffeur's licenses.
(Enact. Acts 1974, ch. 374, Section 7.)

KRS 186.648. Appeal.

An appeal may be had from any final action or order of a court of record entered under the provision of KRS 186.641 to 186.649 in the same manner and form as such an appeal would be noted, perfected and tried in an appropriate criminal case before such court of record.
(Enact. Acts 1974, ch. 374, Section 8.)

KRS 186.649 Law not to affect existing laws or ordinances of

political subdivisions.

Nothing in KRS 186.641 to 186.649 shall be construed as amending, modifying or repealing any existing law of Kentucky, or any existing ordinance of any political subdivision, regulating the operating and licensing of motor vehicles, and providing penalties for the violation thereof; or construed so as to preclude the exercise of the regulatory powers of any division, agency, department or political subdivision of the State of Kentucky having the statutory power to regulate the operation and licensing of motor vehicles.
(Enact. Acts 1974, ch. 374, Section 9.)

KRS 189A.010. Operating a motor vehicle with alcohol concentration of or above 0.10, or of or above 0.02 for persons under age twenty-one, or while under the influence of alcohol or other substance which impairs driving ability prohibited — Presumptions — Penalties.

(1) A person shall not operate or be in physical control of a motor vehicle anywhere in this state:

(a) While the alcohol concentration in his blood or breath is 0.10 or more based on the definition of alcohol concentration in KRS 189A.005;

(b) While under the influence of alcohol;

KRS 189A.070. License revocations — Time period Completion of alcohol or substance treatment or education program required before reinstatement.

(1) Unless the person is under eighteen (18) years of age, in addition to the penalties specified in KRS 189A.010, a person convicted of violation of KRS 189A.010(1)(a), (b), (c), or (d) shall have his license to operate a motor vehicle or motorcycle revoked by the court as follows:

(a) For the first offense within a five (5) year period, ninety days;

(b) For the second offense within a five (5) year period, twelve (12) months;
(c) For a third offense within a five (5) year period, twenty-four (24) months; and . . . . .

STATEMENT

On December 13, 1993 Assistant Jefferson County Attorney John Wilmes filed a Summons Warrant Criminal Complaint against Petitioner Donald Michael Pletcher alleging that Pletcher was in violation of Kentucky Revised Statutes (KRS) 186.642(2) (1974) in that he was a habitual violator under that statute because he had been convicted of driving under the influence three times. Mr. Pletcher had previously been convicted by a plea of guilty to his third offense of driving under the influence (KRS 189A.010) (1991) on September 9, 1993 and had been sentenced pursuant to KRS 189A.070(c) (1991), which provided for a suspension of Pletcher's driving privileges for two (2) years. A finding that Mr. Pletcher is a habitual violator under KRS 186.642(2) (1974) could add at least five (5) additional years suspension to the two (2) year suspension provided by KRS 189A.070(c) (1991). Petitioner

has completed the two year suspension ordered by the KRS 189A.010 conviction of September 9, 1993.

Originally Pletcher filed a Motion to Declare KRS 186.642(2) and KRS 186.646(1) repealed by implication by enactment of KRS 189A.070(c). Numerous other defendants filed Motions before Jefferson County Court challenging the warrants on several grounds. All cases were assigned to Jefferson District Court, Traffic Division 103. On August 31, 1994 Jefferson District Judge Matthew Eckert, by a consolidated opinion, made findings for the defendants in each of these cases and the Commonwealth appealed to the Jefferson Circuit Court. On December 21, 1994 Hon. Ernest Jasmin, Judge Division One, reversed the orders of the District Court remanding the cases to the District court for hearings pursuant to the habitual violator law.

Upon remand Petitioner and other defendants challenged the application of KRS 186.642(2) (1974) to defendants after there had been penalties imposed pursuant to KRS 189A. 070(c) (1991) . The issues included double jeopardy, and

repeal by implication.

The three Jefferson District Judges assigned to the traffic Division at the time, Kevin Garvey, Martin McDonald and Tom McDonald, each held that the subsequent action by the Commonwealth to enforce the provision of the habitual violator statute on the defendants after penalties had been imposed pursuant to KRS 189A.070(c) (1991) violated provisions of the Fifth Amendment to the Constitution of the United States and Section 13 of the Kentucky Constitution. Judge Garvey and Judge Martin McDonald's opinions are in the Appendix, pp. 22a - 45a. Judge Tom McDonald orally adopted those opinions. All pending cases were dismissed as a result of these decisions.

The Commonwealth again appealed the rulings of the Jefferson District Court but designated only the Petitioner in its Notice of Appeal. After the filing of Memorandums and oral argument, Jefferson Circuit Judge Ken Corey, on April 17, 1997 issued an Opinion and Order finding that successive punishments under KRS 189A.070(c) (1991) and KRS

186.646(1) (1974) did not constitute double jeopardy and further that KRS 189A.070 (1991) did not repeal by implication KRS 186.642 (1974) and KRS 186.646 (1974). (App. pp. 11a - 21a).

Pletcher petitioned the Kentucky Court of Appeals for discretionary review which was granted. That court affirmed the Jefferson Circuit Court on September 25, 1998. (App. pp. 1a - 10a). The Supreme Court of Kentucky denied further discretionary review on June 9, 1999. (App. p. 46a).

REASONS FOR GRANTING THE PETITION

I. Imposition of additional driver license penalties under habitual violator statute, in separate proceedings, after similar penalties have been imposed upon a defendant pursuant to a driving under the influence statute constitutes double jeopardy in violation of the Constitution of the United States of America. Amendment V and XIV.

In United States v. Ursery, 518 U.S. 267, 116 S Ct. 2135, 135 LEd.2d 549 (1996), this Court essentially ruled that a forfeiture of property and criminal penalty arising from two

cases involving the same defendant did not necessarily constitute double jeopardy, reversing a United States Court of Appeals for the Sixth Circuit opinion. The Sixth Circuit Court had ruled that criminal charges filed against a defendant after a forfeiture action did constitute double jeopardy. In the same opinion this Court also reversed a holding of the United States Court of Appeals for the Ninth Circuit where that Court had ruled that a civil suit in rem judgment obtained after a criminal conviction constituted double jeopardy.

However, Ursery, supra, at page 2142[4] sets up reasoning for allowing forfeiture cases to be considered as punishment for double jeopardy purposes but the forfeiture must pass one of two tests: (1) It was intended to be criminal; or (2) "The clearest proof" indicates that the forfeiture is so punitive, "either in purpose or effect" as to be equivalent to a criminal proceeding. Petitioner urges that his case meets both test requirements.

The Jefferson County Attorney initiated the Habitual Violator KRS 186 proceedings by the issuance of a criminal

summons complaint for the case to be heard by a District Judge in a traffic court which hears cases that can result in the imposition of criminal penalties including fines and jail sentences. Moreover, KRS 186.648 provides that any appeal involving KRS 186.641 to KRS 186.649 would be noted, perfected and tried in the same manner and form as "an appropriate criminal case before such court of record." It is submitted that the Kentucky legislature, by this language, must have considered KRS 186.641 to 186.649 (1974) to be criminal statutes by nature.

Additionally, other language in the KRS 186.641 to 649 sections give further indication that the Kentucky Legislature must have been thinking of these sections as criminal matters. KRS 186.643 provides that the information is to be filed against the accused by the county attorney in the court having jurisdiction of criminal offenses. KRS 186.644 also uses the word "accused" in two separate sentences. KRS 186.645 uses "accused" in three places and further defines the basis for the Court to "...find such person guilty of being 'an

habitual violator'..." KRS 186.647 provides the method for a person who "...was convicted of being 'an habitual violator'" to have driving privileges restored. That method requires that after the expiration of five (5) years, a Petition may be filed in the Court where the habitual violator conviction was obtained "or any court of record in Kentucky having criminal jurisdiction ... to have his privilege to operate a motor vehicle restored". The statute does not provide any time frame for the restoration, so, realistically the loss of license under the habitual violator statute is greater than five (5) years.

With regard to the second Ursery test, Petitioner submits that combining the sanctions imposed by the Driving Under the Influence statute, KRS 189A.070(c) (1991) with the sanctions imposed by habitual violator statute, KRS 186.646-(1), are so punitive as to be equivalent to a second criminal proceeding. By combining the sanctions of both statutes it is possible for a person's license privileges to be revoked for a total of seven years, plus whatever time until it would take a court to act on a petition for restoration of the license . In fact

that is what would happen in Petitioner's case since he has already "served" his two year license suspension under his KRS 189A.070(c) conviction of 1993. If the Commonwealth is allowed to have "a second bite" at sanctioning Petitioner utilizing KRS 186.646(1) his license suspension could total seven years or more.

In further support of the fact that KRS 186.646(1) is treated as a criminal prosecution Petitioner calls the court's attention to the opinion of Judge Martin McDonald, (App., pp. 37a - 45a) who recites at page 40- 41a that defendants have been put in jail on the basis of the habitual violator criminal complaint when it was made an arrest warrant. Judge Martin McDonald's Opinion provides the example of Commonwealth v. Mark Alexander who was arrested, booked in jail and had the habitual violator warrant used by the arraignment prosecutor as a basis for making a motion to revoke Alexander's probation on the underlying KRS 189A.010 conviction, Driving Under the Influence, (App. p. 41a).

Petitioner submits that this case is very important, not

only to him but also because it involves an issue that presently affects approximately two thousand other cases in Jefferson County as well. That number increases weekly. Moreover, petitioner believes his case deals with an aspect of double jeopardy that has not yet been decided.

Petitioner understands the importance of public safety and realizes that the Habitual Violator laws were enacted for that purpose. However, until December 1993 the DUI portion of KRS 186.646(1) was never enforced with any uniformity, if at all, during the preceding nineteen years. If the license suspension is going to be five years in the interest of public safety, then that is what it should be and not five years suspension plus what ever suspension might already be served as a result of a third offense DUI conviction involving the KRS 189A.070(c) penalty.

Conceptually the Commonwealth of Kentucky, through its agents, the Department of Transportation or traffic court prosecutors could wait until a DUI defendant has completed his KRS 189A suspension to initiate proceedings under KRS

186.642 et seq. The Kentucky General Assembly repealed and reenacted the definition section of KRS 186.642 in 1994 but it did nothing to eliminate the confusion and inequitable application of KRS 186.646(1) (1974) as indicated by the facts of petitioner's case.

Instead of joining the KRS 186.642 et seq habitual violator action with the third offense KRS 189A.010 Driving Under the Influence action as is done routinely in criminal persistent offender cases for second, third and fourth offense felony charges, the County Attorney in petitioner's case filed a second "criminal summons complaint" three months after the penalties had attached to his third offense DUI conviction. By doing so the penalties can and will be enlarged from the five years called for under KRS 186.642 et seq to possibly seven years when added to the two year loss of license under KRS 189.010A, as is the situation with the petitioner.

It would not be a complicated procedure for the County Attorney to initiate its habitual violator proceeding under KRS 186.642 et seq contemporaneously with the Driving

Under the Influence KRS 189.010A charges, or immediately thereafter so that the disposition of both could or would occur in the same proceeding. In that way if there was a third offense DUI conviction the habitual violator statute would become part of the penalty phase of the case. If no DUI conviction, then the complaint would be dismissed.

Petitioner urges that the Opinion of the Court of Appeals does not consider, among other aspects, the importance of the sequence of events in this case. The Kentucky Court of Appeals Opinion, acknowledged that the two statutes could be "reconciled", and that "nothing in the applicable statutes precludes the concurrent running of periods of license suspension and license ineligibility" (App. p. 9a). Unfortunately, that language is dicta rather than holding and does not cure the problem. If the Opinion had mandated that the maximum license suspension would be five (5) years, then presumably the two statutes would be reconciled because it would eliminate any arbitrary interpretation by the Kentucky Transportation Cabinet, the regulating licensing agency.

Petitioner believes that his case should be considered by this Court because it fits both tests discussed by the Court in Ursery, supra, at page 2142[4]. While it is true that drivers licenses are generally regarded as a privilege rather than a right, when the return of that privilege is controlled by the penalty provisions of two separate statutes requiring successive prosecutions and which are subject to arbitrary interpretation, as in petitioner's case, then petitioner's right to the return of his driving privilege after no more than five (5) years has, in fact, been infringed upon. It becomes an additional and separate penalty arising from the second prosecution.

It is urged that petitioner's right to be eligible for license reinstatement in five (5) years under the habitual violator statute, rather than some period more than five (5) years, and possibly up to seven (7) years or more when coupled with the penalties in the Driving Under the Influence statute, does represent an additional penalty that is denounced by the double jeopardy provision of the Fifth Amendment to the Constitution of the United States of America.

Kentucky is not the only state that has enacted habitual violator statutes that enhance the loss of licence after multiple convictions for various offenses. However, a review of cases from other jurisdictions has not provided petitioner with any insight regarding the specific procedure utilized to enforce their statutes. Petitioner is not aware of problems from other state courts involving the separate successive application of two different statutes as has been done in his case.

CONCLUSION

For the reasons set forth herein the petition for certiorari should be granted.

Respectfully submitted,

JOSEPH G. GLASS
235 South Fifth Street
Louisville, Kentucky 40202
(502) 584-7288

Counsel for Petitioner

APPENDIX

APPENDIX

A Opinion of Court of Appeals of Kentucky rendered September, 25, 1998 . . . . . 1a

B Opinion and Order, Jefferson Circuit Court entered April 17, 1997 . . . . . 11a

C Amended Ruling on Defendant's Motion to Dismiss entered November 21, 1995 . . . . . .22a

D Order (Dismissing) entered November 15, 1995. . . . . 37a

E Order of Supreme Court of Kentucky denying Motion for Discretionary Review entered June 9, 1999 . . . . . 46a

RENDERED: September 25, 1998; 10:00 a.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

No. 1997-CA-001159-DG

DONALD MICHAEL PLETCHER APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON
CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 95-XX-188

V.

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and EMBERTON, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on discretionary review of an opinion and order entered by the Jefferson Circuit Court, which reversed and remanded certain orders of the Jefferson District Court. The circuit court adjudged that the state and federal double jeopardy clauses are

not violated by the institution of proceedings pursuant to the habitual violator provisions set out in KRS 186.641, et seq., whereby a convicted habitual violator is precluded from obtaining an operator's license for a period of five years even if his or her operator's license has already been revoked for two years based upon the third-offense conviction of driving while intoxicated (DUI) pursuant to KRS 189A.070(1)(c). The court also held that by enacting KRS 189A.070(1)(c) in 1984, as amended in 1991, the Kentucky General Assembly did not intend to repeal KRS 186.646(1) by implication. Perceiving no error in the circuit court's rulings, we affirm.

On September 9, 1993, appellant Donald Pletcher plead guilty to third-offense DUI. In addition to the penalties imposed pursuant to KRS 189A.010, appellant's operator's license was ordered suspended for two years pursuant to KRS 189A.070(1)(c). Some three months later, an assistant county attorney filed an information alleging that appellant was a habitual violator as defined in KRS 186.642(2), and that the court therefore should declare him ineligible to obtain an opera

tor's license for five years from the date of his conviction. The district judge declined to do so, and instead determined that the state and federal constitutional guarantees against double jeopardy would be violated by proceeding against appellant as a habitual violator after his license already was suspended due to his DUI conviction, as he then would be subjected to multiple punishments for the same offense. The court alternatively concluded that in any event, KRS 189A.070(1)(c) had repealed the penalty provisions of KRS 1876.646(1) by implication. The district judge's decision was reversed on appeal to the circuit court, and we granted appellant's motion for discretionary review.

First, appellant contends that the Commonwealth has subjected him to multiple punishments for the same offense in violation of his constitutional rights against double jeopardy. We disagree.

Appellant in effect argues that a proceeding under Kentucky's habitual violator statutory scheme essentially constitutes a criminal proceeding because (1) a criminal

information is filed by a county attorney. (2) the applicable statutes refer to the "guilt" and "conviction" of the "accused". (3) the case is heard by a district judge with authority to impose criminal penalties, and (4) the right to appeal must be exercised in accordance with the rules applicable to criminal proceedings. Appellant argues that it is therefore clear that habitual violator proceedings are intended to constitute criminal prosecutions. Moreover, since habitual violators incur severe license sanctions in addition to the sanctions imposed pursuant to the applicable DUI statutes, appellant urges that habitual violator proceedings clearly are equivalent to criminal proceedings.

Appellant therefore urges that since it appears that the legislature intended the habitual violator statutes to be criminal rather than civil in nature, and since the applicable penalties amount to criminal punishments in purpose or effect he clearly and impermissibly has been subjected to multiple punishments for the same offense. See North Carolina v. Pearce, 395 U.S. 711 S. Ct. 2072, 23 L. Ed. 656 (1069). However, appellant's

entire double jeopardy argument is seriously flawed since its basic premise, that a court-ordered suspension or revocation of an operator's license is a "criminal punishment," is untenable. Indeed, just the opposite is true.

The operation of an automobile is a privilege, not a right, which is subject to reasonable regulation by the state pursuant to its police power. Commonwealth, Transportation Cabinet v. Cornell, Ky. App., 796 SW2d 591 (1990). As a legitimately regulated privilege, the right to possess an operator's license does not involve an inherently fundamental and constitutionally protected right. Division of Driver Licensing v. Bergmann, Ky., 740 SW2d 948 (1987). Moreover, proceedings to revoke or suspend a license are intended not to punish, but rather to advance the compelling state interest in protecting the public by removing drunk drivers from the highways. Butler v. Groce, Ky., 880 SW2d 547 (1994). Further, conviction as a habitual violator does not require proof of criminal intent to commit the offense, and the statutory restraints imposed upon the violator's operation of a

motor vehicle do not approach the levels of restraint imposed by imprisonment after criminal prosecutions. Thus, contrary to appellant's argument, it is clear that habitual violator proceedings involve civil rather than criminal sanctions, and we find no significance in the fact that the habitual violator statutes utilize some of the same terms used in criminal statutes and prosecutions. Finally, as nothing precludes civil and criminal proceedings from sharing common goals, it is not significant that appellant's habitual violator conduct is also punishable as criminal offense, or that deterrence may be the goal of both types of proceedings. Hence, we conclude that there has been no violation of the protections afforded by the double jeopardy clause in criminal proceedings. See Hudson v. United States, 522 U.S. ___, 118 S. Ct. 488, 139 L. Ed.2d 450 (1997). See also Kohler v. Commonwealth, Ky., App., 944 SW2d 146 (1997). Our conclusion in this vein is supported by numerous authorities from other jurisdictions. See, e.g., State v. Funke, 531 N. W. 2d 124 (Iowa 1995).

Next, appellant contends that the Kentucky General

Assembly's adoption of KRS 189A.070(c) in 1984, as amended in 1991, providing for the two-year suspension of the operators licenses of persons convicted of third-offense DUI, signified its intention to repeal by implication both KRS 186.642(2) (defining habitual violators) and KRS 186.646(1) (providing for five-year license suspensions). Again, we disagree.

The doctrine of repeal by implication is not favored, and it will be applied only if a newer statute is so repugnant to, or irreconcilable with, an earlier statute that no other reasonable construction can be found. Sumpter v. Burchett, 304 Ky. 858, 202 SW2d 735 (1947). In short, a repeal by implication will be found to exist only if it is impossible to uphold both of the statutes in question. Hallahan v. Sawyer, Ky., 390 SW2d 664 (1965). We perceive no basis for invoking this doctrine herein.

KRS 189A.070(1)(c) mandates that the license of a person who is convicted of a third-offense DUI within a five-year period shall be revoked by the court for two years. The

habitual violator statutory scheme, by contrast, imposes the burden on county attorneys to initiate such proceedings in district court by filing informations against persons who are certified by the transportation cabinet as habitual violators as defined in KRS 186.642. If the court determines after a hearing that such a person is a habitual violator, the court must order that person not to operate a motor vehicle upon public highways, and the transportation cabinet is prohibited from issuing an operator's license to that person until the expiration of the statutory period of time for the particular offense involved.

We find no basis for concluding that KRS 189A.070-(1)(c) and the habitual violator statutes are repugnant and irreconcilable. Indeed, there is no reason that a statutorily required two-year suspension of a person's operator's license after a third-offense DUI conviction cannot be reconciled with a five-year suspension of eligibility for an operator's license after a related habitual violator civil proceeding. In the first place, one proceeding is a criminal prosecution, while the

other is a civil matter involving noncriminal sanctions. Morever, nothing in the applicable statutes precludes the concurrent running of periods of license suspension and license ineligibility. Thus, while imposing suspensions under two different statutes may have a duplicative effect, the applicable criminal suspension and habitual violator statutes are not thereby rendered so repugnant and irreconcilable that one statute must be deemed to repeal the other by implication. Instead, we believe that the legislative intent embodied in the statutes at issue was to ensure the third-offense DUI violators' license would be revoked for at least two years pursuant to KRS 189A.070(1)(c), even in the absence of habitual violator prosecutions. Viewed in this light, the legislation in issue can be harmonized and interpreted so as to give effect to all of the questioned statutes, consistent with our duty to do so. Commonwealth v. Halsell, Ky., 934 SW2d 552 (1996). Accordingly, we decline to hold that KRS 189A.070(1)(c) was legislatively intended to repeal by implication KRS 186.646(1). The circuit court's opinion and order are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph G. Glass
Louisville, KY

BRIEF FOR APPELLEE:

Mike Conliffe
Jefferson County Attorney

B. Keefe Montgomery
Assistant Jefferson County Attorney
Louisville, KY

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

JUDGE KEN G. COREY
NO. 95-XX-0188

COMMONWEALTH OF KENTUCKY APPELLANT

V. OPINION AND ORDER

DONALD MICHAEL PLETCHER APPELLEE

****

This matter is before the Court on appeal from separate judgments of the Jefferson District Court, Traffic Division, by the Honorable Kevin L. Garvey, the Honorable Martin F. McDonald, and the Honorable Thomas McDonald. On November 15, 1995, and November 21, 1995, the District Court entered Orders dismissing the conviction (sic) of the Defendant, Donald Michael Pletcher ("Pletcher"). The Commonwealth appealed Pletcher's conviction (sic). The Court has considered the Statement and Counterstatement of Appeal, the authorities cited therein, the record on appeal herein; and being otherwise sufficiently advised, is of the following Opinion and enters the following Order.

The Defendant was charged with violating the Habitual Violator Law, KRS 186.641 et seq. In its Order of November 15, 1995, the District Court found Pletcher's arguments persuasive. The District Court agreed the habitual violator statutes violated double jeopardy principles of section 13 of the Kentucky constitution, and the 5th Amendment of the United States Constitution. Relying on U.S. v. Ursery, the District Court further concluded in its Amended Ruling, November 21, 1995, that the Habitual Violator sanction constituted punishment for purposes of the double jeopardy analysis, and, therefore, found the law unconstitutional. On both rulings, the Court reverses.

In determining whether a civil sanction arising from a separate criminal proceeding violates double jeopardy protections, the Court must look to three factors: "(1) whether the civil forfeiture in the instant case constitutes 'punishment' for double jeopardy purposes; (2) whether the civil forfeiture and criminal conviction are punishment for the same offense; and (3) whether the civil forfeiture and criminal prosecution are

separate proceedings." United States v. Ursery, 59 F. 3rd 568 (6th Cir. 1995).

The District Court noted that the practice of using a "criminal complaint" as opposed to an "information" was dispositive in its determination that the Habitual Violator Law is a criminal statute. However, in United States v. Halper, 490 US.435, 447 (1989), the Supreme Court held that "...labels 'criminal' and 'civil' are not of paramount importance." Moreover, case law from other jurisdictions reveals that similar habitual offender statutes are treated as civil proceedings. Everhart v. State, 563 S.W.2d 795, 797 (Tenn. Crim.App., 1978). Revocation under habitual offender statutes is not punishment for an offense, but is for the protection of the public in removing a dangerous driver from the highways. Huffman v. Commonwealth, 210 Va.530, 172 S.E.2d 788,780 (1970). See also, State v. Bowles, 311 A.2d 300 (N.H., 1973); State v. Page, 332 So.2d 427 (La., 1976).

These cases comport with Kentucky decisions holding that license revocation is not punishment but a cautionary

measure to protect the safety of the general public. Commonwealth v. Steiber, Ky., 697 S.W.2d 135, 136 (1985). A driver's license is a legislatively regulated privilege, not an inherently fundamental right. Division of Driver Licensing v. Bergman, Ky., 740 S.W.2d 948, 951 (1987). Although the private interest in possessing a driver;s license is high, ..."the state has a compelling interest in removing drunk driver's from its highways. Commonwealth v. Raines, Ky., 847 S.W.2d 724, 728 (1993).

Accordingly, although the document initiating these proceedings takes the form of a "criminal complaint", this label is only an issue of form, and should not override the administrative substance of the proceeding. As aforementioned, license revocation is not punishment but a civil, remedial measure to protect the public at large, and this Court finds the District Court erred in holding otherwise.

The lower court also found that the Habitual Violator sanctions and the criminal conviction punishments are in fact punishment for the same offense. A review of the statutes,

however, reveals that they deal with different sanctions. The Habitual Violator Law allows for revocation of a driver's license for three or more convictions on the charge of voluntary or involuntary manslaughter involving a motor vehicle, driving under the influence or driving while intoxicated, operating a motor vehicle on a suspended license, perjury to the Transportation Cabinet on an application, motor vehicle felony, failure to stop offenses, or fifteen or more moving traffic offenses.

On the other hand, KRS 189A.070 provides for criminal penalties for violations of KRS 189A.010 (Operating a motor vehicle under the influence of alcohol or another substance which impairs driving ability). The statute provides for penalties for specific offenses, depending on how many times a driver has previously been convicted of violating KRS 189A.010. While the statutes are similar in that they both provide for license revocations, they do so on different bases. As the Commonwealth correctly points out, the criminal prosecution under KRS 189A.070, and the civil forfeiture of KRS 186.

646(1) are separate proceedings for double jeopardy purposes.

Moreover, KRS 186.649 provides as follows:

> Nothing in KRS 186.641 to 186.649 shall be construed as amending, modifying or repealing any existing law to Kentucky, or any existing ordinance of any political subdivision, regulating the operating and licensing of motor vehicle, and providing penalties for the violation thereof; or construed so as to preclude the exercise of the regulatory powers of any division, agency, department or political subdivision of the state of Kentucky having the statutory power to regulate the operation and licensing of motor vehicles.

Clearly, the General Assembly enacted KRS 186.649 as a supplement, not a replacement, for other traffic laws. The statute specifically indicates that the Habitual violator Law is a separate statutory proceeding from other revocation proceedings.

Furthermore, the operation of the Habitual Violator Law does not violate the prohibition against double jeopardy as it is clear that a legislature may specifically authorize cumulative punishment. Crayton v. Commonwealth, 846 S.W.2d 684, 690 (Ky. 1992), cert.denied _____U.S. ___, 114 S.Ct.165, ___

L.Ed.2d ___ (1993); Cooley v. Commonwealth, Ky., 821 S.W.2d 90 (1991). Considering the independent subject matter of the Habitual Violator Law, therefore, this Court concludes the District Court erred in finding the civil forfeiture under KRS 186.641, and the criminal prosecution pursuant to KRS 189A.070 are successive punishments for the same offense.

The Appellee argues the amendments to KRS 189A.-070 enacted in 1991 repealed by implication KRS 186.642(2) and KRS 186.646(c). This Court does not agree. The doctrine of repeal by implication is a "rule of statutory construction," Strader v. Commonwealth, Ky., 194 S.W.2d 368 (1946), under which "irreconcilable" statutes, are interpreted. "Repeals by implication are never favored and will be sanctioned only when there is such a conflict between the two [statutes] that effect can not be given to both." Sumpter v. Burchett, Ky., 202 S.W.2d 735,736 (1947).

The statutory provisions in this case are not in conflict. As aforementioned, KRS 189A.070 and KRS 186.642 et.al.

represent two separate approaches taken by the Kentucky legislature to combat drunk driving, and to safeguard Kentucky's highways.

The Habitual Violator statutes, KRS 186.642 and 186.646, under which these actions arise, fulfill the legislative purpose of public safety. The U.S. Supreme Court has held that "[s]tates have a valid interest in deterring and segregating habitual criminals." Parke v. Raley, 506 U.S. ___, 113 S.Ct. 517, 522, 121 L.Ed.2d 391, 402 (1992). reh. denied ___U.S. ____, 122 L.Ed.2d 372. KRS 186.646 imposes upon a person defined as a "habitual violator" under KRS 186.642 the penalty of a revocation of the violator's driver's licence for a period of five years. Such a penalty removes from the public highways "those drivers who, by a persistent pattern of traffic violations, demonstrate a disregard...for the well-being of other persons..." and for the Kentucky laws regulating motor vehicles. See 48 A.L.R. 4th 383 (1986). Status as a habitual violator originates with the Transportation Cabinet, and after an evidentiary hearing affording the alleged violator due process, the

Cabinet imposes the penalty. KRS 186.642 et seq.

In contrast, KRS 189A.070, as amended in 1991, imposes specific criminal penalties on persons convicted of driving under the influence of alcohol or drugs. The penalties under this statute are not based on the offender's status as a habitual violator of general traffic laws. Transportation Cabinet v. Bergmann, Ky., 740 S.W.2d 948, 950 (1987). KRS 189A.070 imposes criminal penalties on first and second-time DUI offenders, as well as third-time DUI offenders. Unlike the forfeiture of one's license to the Transportation Cabinet under KRS 186.646, KRS 189A.070(1)(c) requires the immediate revocation and surrender to the court for a period of twenty-four months for an offender's third offense.

Finally, penalties imposed under KRS 189A.070(1)(c) were intended by the legislature to be a supplement, not replacement, to KRS 186.642 and KRS 186.646 relating to the "safety for all persons using the highways of [the] Commonwealth." H.B. 11, 129th Leg., Extraordinary Sess. (1991) (enacted) (purpose declared for Sections 8-23 of bill; amend

ments to KRS 189A.070 excluded and found at Section 4 of the bill). The statutory provisions, therefore, are not conflicting.

While this Court notes the case cited by the Appellee from another division of the Jefferson Circuit Court may not be cited as authority by this Court, it is noteworthy that the Honorable Judge Ernest A. Jasmin rendered a decision consistent with this Court's ruling herein.

Therefore, IT IS HEREBY ORDERED AND ADJUDGED that as a matter of law, KRS 186.641 et. seq., also known as the Habitual Violator Law, is VALID AND ENFORCEABLE. IT IS FURTHER ORDERED AND ADJUDGED that the Orders of the Jefferson District Court, Traffic Division dated, November 15, 1995, November 21, 1995, and oral order of November 15, 1995, in the above named action, are REVERSED AND REMANDED to the District Court for further action pursuant to the Habitual Violator Law.

There being no just cause for delay, this is a final order.

Signed/Ken Corey
KEN G. COREY, JUDGE

17 April 1997
DATE

cc: B. Keefe Montgomery
Joseph G. Glass
Hon. Judge Kevin L. Garvey
Hon. Judge Thomas McDonald
Hon. Judge Martin F. McDonald

NO. 93TO86014 JEFFERSON DISTRICT COURT

TRAFFIC DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. AMENDED
RULING ON DEFENDANT'S
MOTION TO DISMISS

DONALD MICHAEL PLETCHER DEFENDANT

* * * * * * * *

This case along with many others is before the Court raising the issue of whether it constitutes double jeopardy for the Commonwealth to initiate the Habitual Violator statute (KRS 186.646) in a separate subsequent proceeding. The Habitual Violator statute states that "no license to operate motor vehicles in Kentucky shall be issued to a convicted habitual violator: (1) for a period of five (5) years from the date of the order of the court finding such person to be "an habitual violator," wherein the conviction relate to the offenses listed in KRS 186.642(1)(2) and (2) (for a period of two years from the date of the order of the court finding such person to be "an habitual violator," for any offense other than those for which a penalty is provided in (1) of this section. In pertinent

part the habitual violator definition, KRS 186.642 states "an habitual violator shall be construed to mean any person, resident or non-resident, who has been convicted in this state or elsewhere; (1) three or more times of voluntary or involuntary manslaughter occurring on separate dates and resulting from the operation of a motor vehicle; or (2) three or more times of violating the provisions of KRS 189A relating to the operation of vehicles while under the influence of controlled substance or intoxicating liquors, or violating the law of any other state, or a valid municipal or county ordinance, substantially conforming to or paralleling said section. This habitual violator definition contains seven more sections which spell out other situations which could lead to a person being found to be an habitual violator.

The cases were initiated by the County Attorney swearing out a criminal complaint which alleges that an individual meets the criteria of one or more sections contained in KRS 186.642. KRS 186.643 requires the County Attorney, upon receiving from the Secretary of the Transportation Cabinet the

abstract of record, shall forthwith file an information against the accused person in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides. Criminal rule RCr. 6.02(2) distinguishes between an indictment, an information, a criminal complaint (which is the form presently being used by the County Attorney's Office), post-arrest complaints and citations. The fact that the County Attorney is proceeding by criminal complaint rather than by "information" as the statute requires may, in and of itself, be enough to dismiss the case. However, I will proceed to address several other issues which have been raised.

The Defendant is summoned to court whereupon the County Attorney presents a certified copy of the Defendant's driving record and asks the court to make a finding that the Defendant meets one or more of the criteria listed under the definition for habitual offender (KRS 186.642). If the Court finds that the Defendant is an habitual violator, the Defendant is unable to obtain a license for a period of five years when the finding relates to offenses listed in KRS 186.642(1) or (2).

(KRS 186.642(2) deals with three or more DUI convictions within a five year period.) The habitual violator charge is not being brought simultaneously with the offense which, if convicted, would make the Defendant qualify for habitual violator status.

The consequences of a Defendant pleading guilty to DUI are contained in KRS 189A.010 and KRS 189A.070. In KRS 189A.010(4)(a)(b)(c)(d), sentencing guidelines are prescribed. In addition to the fines and jail time listed in KRS 189A.010(4), a Defendant convicted of DUI is also subject to license revocation periods listed in KRS 189A.070. A person convicted of DUI First Offense within five year suffers a 90-day license revocation, second offense within five years a 12-month license revocation, third offense within five years a 24-month license revocation and fourth or subsequent offense within five years a 60-month license revocation. This license revocation is not discretionary and is revoked by the court upon conviction of a DUI offense under KRS 189A.010.

The issue in this case is whether, in a subsequent sepa-

rate proceeding, the Commonwealth may initiate an action against a person which could result in the individual being ineligible for a driver's license in the state of Kentucky for up to a five year period and whether that is punishment or a remedial measure by the State.

The Commonwealth argues that a driver's license is a legitimately regulated privilege. Transportation Cabinet vs. Bergmann, 740 S.W.2d 948, 951 (KY, 1987). Since this is a privilege and no right or entitlement to drive exists, the deprivation of a license to drive is not punishment. The Commonwealth also cites Commonwealth vs. Raines, 847 S.W.2d 724, 728, (KY, 1993) wherein it states that the Kentucky Supreme Court has held "that although the private interest in possessing a driver's license is high, the state has a compelling interest in removing drunk drivers from its highways." The Commonwealth also cites Crayton vs Commonwealth, 846 S.W.2d 684, 690 (KY, 1992) which states that it is clear that a legislature may specifically authorize cumulative punishment. The Supreme Court has also held that license revocation is not

punishment. Commonwealth vs. Steiber, 697 S.W.2d 135 (KY, 1985). In the Steiber case the court stated that the license revocation is "ministerial" and "not a punishment but a cautionary measure to protect the safety of the public. Id at 136. The Commonwealth also contends that the habitual violator proceeding does not constitute double jeopardy because it is an administrative or civil sanction and, therefore, not deeded to be punishment within the meaning of the double jeopardy clause. Helvering vs. Mitchell, 303 U.S. 391, 399 (1938).

The Defendant contends that the license revocation is part of the punishment when he pleads guilty to DUI. In fact, the license revocation may be the harshest consequence associated with a conviction for DUI. When an individual pleads guilty to DUI KRS 189A.010 prescribes sentencing guidelines and KRS 189A.070 prescribes mandatory period of license revocation.

Is mandatory license revocation punishment?

In United States vs. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104

L.Ed.2d 487 (1989), the Supreme Court considered whether and under what circumstances a civil penalty may constitute "punishment" for the purposes of double jeopardy analysis. The Court in Halper explained that double jeopardy protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. The sole question in the Halper case was whether the statutory penalty authorized by the Civil False Claims Act, under which Halper is subject to liability of $130,000 for false claims amounting to $585, constitutes a second "punishment: for the purpose of double jeopardy analysis. The government took the position that punishment in the relevant sense is meted out only in criminal proceedings. The Court, however, noted that the "humane interest" safeguarded by the double jeopardy clause is a constitutional protection intrinsically personal. Violation of the double jeopardy protection can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

In making this assessment, the labels "criminal" and "civil" are not of paramount importance. Civil proceedings may advance punitive as well as remedial goals and, conversely, both punitive and remedial goals may be served by criminal penalties. The determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may be fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. United States vs. Halper, 490 U.S. 435, 109 Sup. Ct. 1892 (1989).

It has been recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Kennedy vs. Mendoza-Martinez, 372 U.S. 144, 168 (1963). It follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment, as we have come to understand the term. The Halper

court, therefore, held that under the double jeopardy clause a Defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution. United States vs. Halper, 490 U.S. 435, 109 Sup. Ct. 1892 (1989).

The Court noted that this decision did not prevent the government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple punishment issue would be limited to insuring that the total punishment did not exceed that authorized by the legislature. Where a legislature specifically authorized punitive punishment under two statutes a prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. United States vs. Halper, 490 U.S. 435, 109 Sup. Ct. 1982 (1989).

Is loss of license for a five-year period a punishment for double jeopardy purposes?

In the recent case of United States vs. Ursery, 59 F.3rd 568 (Sixth Circuit, 1995) the U.S. Sixth Circuit Court of Appeals reversed a conviction of manufacturing marijuana. On July 30, 1992, officers executed a warrant and seized 1421 marijuana plants. In September of 1992, the U.S. Attorney's Office instituted a civil forfeiture action against a Defendant and his wife. The Urserys and the government entered into a settlement in which the Urserys agreed to pay the government $13,250.00. A consent judgment was entered May 24, 1993.

During this time the Federal Grand Jury in the Eastern District of Michigan returned a criminal indictment. A jury trial commenced on June 30, 1993, and the jury returned a guilty verdict July 2, 1993. Ursery argued on appeal that his criminal prosecution and punishment after settlement of the civil forfeiture proceeding based on the same conduct violated the double jeopardy clause of the Fifth Amendment. The Court in Ursery stated that "the double jeopardy clause protects against three district abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same of-

fense after conviction; and multiple punishments for the same offense." United States v. Halper, 490 U.S. 435, 440, 109 Sup. Ct. 1892, 104 L.Ed.2d 487 (1989). The Ninth Circuit also noted, "at its most fundamental level (the double jeopardy clause) protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense." United States vs. 405,000,089.23 U.S. Currency, 33 Fed.3d 1210, 1215 (Ninth Circuit, 1994). The Court in the Ursery case used three criteria to determine whether the government violated Ursery's constitutional right protected by the double jeopardy clause. Those three determinations are: (1) whether the civil forfeiture in the instant cases constitutes "punishment" for double jeopardy purposes; (2) whether civil forfeiture and criminal conviction are punishment for the same offense; and (3) whether the civil forfeiture and criminal prosecution are separate proceedings. The Sixth Circuit answered each of these questions in the affirmative and reversed the criminal conviction of Mr. Ursery citing it as a second punishment that violated the double jeopardy clause.

This Court will use the criteria used in Ursery to examine the habitual violator statute. The first determination is whether the revocation of a person's driving privileges for a period up to five years constitutes a punishment for double jeopardy purposes. It is clear from an examination of the law regarding conviction for DUI offenses that mandatory license revocation periods are part of the consequences of guilty defendants. Using the criteria set out in the Halper case, i.e. assessing the character of the actual sanctions imposed on the individual" license revocation is most assuredly a punishment. While the habitual violator statute could be said to promote legitimate state purpose, i.e. keeping dangerous drivers off the road, the offenses which make one eligible to be classified as an habitual violator also carry license revocation penalties which serve the same legitimate state interest. The conclusion of the Court is that the license revocation under the habitual violator statute does constitute punishment for double jeopardy purposes.

Question two under the Ursery criteria is whether the

habitual violator sanctions can be sanctions for the criminal conviction under the DUI convictions or punishment for the same offense. KRS 189A.070 sets out the mandatory license revocation periods for criminal convictions for DUI. KRS 186.646 sets out the mandatory license revocation period for habitual violator status and KRS 186.642 sets out the criteria for finding that a person convicted of DUI three or more times makes a person eligible for the finding that they are an habitual violator. The Court, therefore, concludes that the habitual violator sanctions and the criminal conviction punishments are in fact punishment for the same offense.

The third criteria under the Ursery case is whether the license revocation of the habitual offender statute and the criminal prosecution for the underlying offenses which make a person eligible for the finding by a court to be an habitual violator, i.e the criminal prosecutions for DUI, are separate proceedings. The habitual violator proceedings which have come before this court have all been separate proceedings. The offense which would, if a conviction resulted, make an

individual meet the habitual violator criteria has always been brought in a separate criminal action with the habitual violator action being a subsequent proceeding. It is well settled that the government may seek and obtain both the full civil penalty and the full range of statutorily authorized criminal penalties and in the same proceeding. Halper at 450. The double jeopardy clause protects the accused from multiple punishments in multiple proceedings for the same offense. Under United States vs. Dixon, -U.S.-, 113 Sup. Ct 2849, 125 L.Ed.2d 556 (1993) the test for whether two offenses constitute the "same offense" is whether "each offense contains an element not contained in the other." United States vs. Dixon, -U.S.- 113 Sup. Ct 2849, 125 L.Ed.2d 556 (1993).

This Court finds that these cases are being initiated improperly by the filling of a criminal complaint rather than by the process of filing an "information" as required by KRS 186.643.

This Court finds that the license suspension which results from the Court finding that a defendant is an habitual

violator is as much, if not more, punitive than it is remedial in nature. As such, the Court concludes that initiating the charge of "habitual violator" as a separate action violates the Defendant's constitutional right protected by the double jeopardy clause.

Accordingly, and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the charge against the Defendant is DISMISSED.

Signed/ Kevin L. Garvey
KEVIN L. GARVEY, JUDGE
JEFFERSON DISTRICT COURT

11/21/95
DATE

ENTERED IN COURT

NOV 21 1995

TONY MILLER, CLERK
By Signed/S. Self D.C.

CASE NO.(SEE LIST) JEFFERSON DISTRICT COURT

TRAFFIC DIVISION 102

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. ORDER

HABITUAL VIOLATOR (SEE ATTACHED LIST) DEFENDANTS

* * * * * * * * *

These matters came before the Court on November 15, 1995, for the Court's ruling on Defendants' consolidated Motions to Dismiss. All cases on today's docket which concern the Habitual Violator provisions of KRS 186.641 to 186.992 have been consolidated herein. (See Attached Listing). This Court has heard the arguments and reviewed the memoranda submitted by the County Attorney, as well as by various defense counsel concerning the validity and enforceability of the Habitual violator prosecutions.

There are many arguments made attacking the constitutionality of these proceedings. However, the one that this Court finds as most appropriate is the double jeopardy provisions of the Fifth Amendment of the United States Constitution

and Section 13 of the Kentucky Constitution.

The County's position in these cases is that the habitual violator statutes do not offend double jeopardy principles because the habitual violator statutes are civil proceedings. The proceedings are considered penalty enhancements which are remedial in nature. Further, they are not a punishment, but a mechanism to provide for safety of those on the highway by removing drivers who demonstrate a persistent pattern of traffic violations. The county's argument is well supported by case law as demonstrated in the memoranda of record. Basically, the double jeopardy argument does not come into play here if the county's position is sustained.

On the other side is the defense's contention to the opposite effect, that these habitual violator proceedings are indeed multiple punishments for the same offense after convictions. Because the Defendant has already been convicted and received the statutorily mandated punishment(s) for the underlying third conviction(s) as outlined and defined in KRS 186.642. Therefore, proceeding against the defendant(s) in a sub-

sequent action pursuant to habitual violator statutes KRS 186.-642 et seq. would be barred by double jeopardy principles. See Cooley vs. Commonwealth, 821 S.W.2d 90 KY (1991) and Ingram vs. Commonwealth, 801 S.W.2d 321, KY (1990).

This controversy before the Court is not new and other cases have recently been appealed to the Circuit Court which found the statutes valid and enforceable. (See Commonwealth vs. Kevin Willis, Jefferson Circuit Court, Division 1, Case No. 94XX0133 through 94XX0157). In his opinion, the Hon. Ernest Jasmin noted (in Footnote 1, page 4) that the "habitual offender law certainly appears at first blush to be a criminal statute...". The Court went on to outline the criminal law terminology utilized in the statute which could lead one to the "not unreasonable assumption" that the statute is criminal.

The Circuit Judge then considered the case law submitted from other jurisdictions (most of which has been submitted by the County in the cases at hand) showing that the habitual violator statutes are treated as civil proceedings. The Circuit Court found these arguments persuasive and upheld the stat

utes' constitutionality.

However, this Court has been presented with additional information which distinguishes these cases as follows:

1. The habitual violator cases have not been initiated by the County in the manner prescribed by KRS 186.-643. The statute requires that the County Attorney proceed against the "accused" via an "information." See RCr. 6). However, each and every one of these has been initiated by a criminal complaint. (See RCr. 2)

2. The habitual violator actions are <u>not</u> pursued contemporaneously with the underlying third offense, the convictions of which (usually a plea bargain) trigger the habitual violator statutes. However, these habitual violator actions are, in most instances, pursued by the same prosecutor's office that was involved with the underlying third conviction, seeking a greater license suspension period than was bargained for initially in the underlying case.

3. Defendant(s) are being put in jail on these cases

when the criminal complaint has been made an arrest warrant. For example, see Case No 95TO52311, Commonwealth vs. Mark Alexander. Mr. Alexander was arrested and booked in jail pursuant to this procedure. It just so happened that this very same judge was presiding over the Arraignment Court on the day when Mr. Alexander was brought out of the holdover. At this arraignment, the prosecutor used the "habitual violator" warrant as the basis for making a motion to revoke the Defendant's probation on his previous conviction.

4. The penalty section KRS 186.992 places the punishment for one who violates the provisions of the Habitual Violator at confinement up to 12 months.

The four items delineated above, when considered with the existing case law and previous appeals to Circuit Court convince this Court that the habitual violator statutes are clearly punitive in nature. While the statutes may very well have a remedial purpose, they also contains an obvious punitive

purpose and effect in these cases. To find otherwise would be to ignore the obvious.

Therefore, this Court finds the double jeopardy argument persuasive and rules accordingly. This Court believes that this ruling is consistent with current case law. In United States vs. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the Supreme Court held that punishment could cross the bounds of both criminal and civil proceedings. The Court reasoned that the civil proceedings may advance punitive as well as remedial goals. (490 U.S. at 447). Furthermore, a sanction which is designed, even in part to deter or punish will constitute punishment, even if the sanction also serves some remedial purpose. Austin vs. United States, 113 S.Ct. 2801, 2806, 125 L.Ed.2d 488 (1993).

Wherefore, for all the above reasons, this Court finds the habitual violator statutes are unconstitutional as violating both the Fifth Amendment of the U.S. Constitution and Section 13 of the Kentucky Constitution's double jeopardy protections and, therefore, sustains the Defendants Motions to Dismiss.

Further, this Court separately finds that the habitual violator cases have been prosecuted contrary to the provisions of KRS 186.643 for failure to follow the "information" process as required in the statute and are likewise dismissed.

This is a final and appealable judgment.

Signed/Martin F. McDonald
MARTIN F. MCDONALD, JUDGE
JEFFERSON DISTRICT COURT
Date 11-15-95

HAMPTON, GEORGE A., III	95TO17939A
HARDIN, DANNY	95TO53259A
HARPER, THOMAS L.	95TO52423A
HAWKINS, LINDA T.	95TO18384A
HEADDEN, JOHN A.	95TO18855A
HEATH, BILLY	95TO52424A
HEFFNER, MELVIN	95TO18854A
HENSLEY, ROBIN D.	95TO50938A
HIGDON, DANNY E.	95TO50939A
HIRST, WAYNE A.	95TO18853A
HOGAN, VERNON E.	95TO17941A
HOLLAND, RODNEY V.	95TO18399A
HORN, GREGORY W.	95TO50940A
HUBBUCH, DANIEL L.	95TO18852A
HUDGINS, RONDALL L.	95TO18396A
JACOBS, JAY T.	95TO52425A
JANES, MICHAEL J.	95TO18392A
JECKER, STEPHEN D.	95TO18393A
JENKINS, GINA M.	95TO52427A
JOHNS, RICHARD W.	95TO81394A
JOHNSON, COREY L.	95TO53253A
JOHNSON, ROBERT J.	95TO17931A
JONES, CHARLES C.	95TO50941A
JONES, DARYL L.	95TO52422A
JONES, JOHN C.	95TO50942A
JONES, MELVIN J.	95TO18395A
KEE, ROGER D.	95TO52430A
KESSSINGER, WAYNE D.	95TO52429A
KING, JEFFREY D.	95TO50943A
KING, KERRY M.	95TO18850A
KING, SHAWN L.	95TO52428A
KINNAIRD, LAWRENCE	95TO52432A
KIRBY, OLIA V.	95TO50944A
KLEIN, CHRISTIAN H.	95TO59045A
KORTZ, JOSEPH M.	95TO52433A
LANE, CINDY L.	95TO17936A
LARMEE, DANNELLA H .	95TO53254A
LAUZON, MICHAEL E.	95TO17937A

LAWSON, RICHARD A.	95TO50949A
LAWSON, RICKY G.	94TO25730A
LOGSDON, MICHAEL	95TO18851A
LOVE, LAWRENCE	95TO53255A
LONEY, GEORGE L., JR.	95TO18849A
LYVERS, LEIGH A.	95TO53256A
MADDOX, JAMES R.	95TO50946A
MAHONEY, TIM	95TO50947A
MARTIN, DARRELL	95TO18848A
MARTIN, DAVID	95TO52435A
MARTIN, RONALD	95TO52438A
MATTINGLY, KENNETH	95TO18847A
MATTINGLY, ROBERT	95TO18389A
MAY, JAMES C.	95TO52300A
MAYER, COLLEN	95TO50948A
MCELROY, CHARLES	95TO50954A
MCFRLAND, CONNI	95TO52436A
MEDLEY, PHILIP C.	95TO52301A
MEREDITH, JACK	95TO50952A
MERRICK, DEAN	95TO17935A
MILLER, JOHN D.	95TO53248A
MILLER, KENNETH	95TO53249A
MILLER, RONALD	95TO18990A
MILLER, RONNIE	95TO53250A
MOORE, DAVID	95TO52302A
MORGAN, JIMMY K.	95TO53251A
NALLEY, KENNETH W.	95TO50951A
NARDI, ALFRED	95TO18846A
NEALS, JIMMIE	95TO17934A
NEELY, CRAIG	95TO53252A
NELMS, WILLIAM	95TO53201A
NELSON, DONNIE	95TO50950A
NEWMAN, KEITH	95TO17933A
PURTILAR, HARRY	95TO17932A
PRUNTY, TIMOTHY	95TO53202A
RICHENDOLLAR, ERIK	95TO43203A

SUPREME COURT OF KENTUCKY
98-SC-872-D
(98-CA-1159)

DONALD MICHAEL PLETCHER MOVANT

JEFFERSON CIRCUIT COURT
V. 95-XX-188

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 9, 1999.

Signed/ Joseph E. Lambert

Chief Justice